the Enactment and specially authorised to prosecute in writing by the Supervisor or a Deputy Supervisor; (2) there was no evidence in this case that the Police Inspector had any authority to prosecute and therefore the trial was a nullity.

The following cases were referred to by counsel in argument: *Gokulchand Dwarkadas v. R.* A.I.R. 1948 P.C. 82, 52 C.W.N. 325; *Kon Fatt Kiew v. Public Prosecutor* (1935) M.L.J. 239, (1935) F.M.S.L.R. 93; *R. v. Oliver* (1943) 2 All E.R. 800; *R. v. Sivaprakasam* (1938) M.L.J. 217; and *Lee Yew v. Public Prosecutor* (1953) M.L.J. 211.

MAGISTRATE'S CRIMINAL APPEAL.

C. O. G. Gould for the appellant.

M. M. Hashim (Federal Counsel) for the respondent.

Wilson J. : — The appellant was charged originally with having unlawful possession of 21 katties of scrap rubber, an offence against the Emergency (Rubber Control) Regulations, 1949. Police Inspector Abdul Kudus appeared for the prosecution and immediately withdrew the charge and substituted for it a charge of purchasing 21 katties of scrap rubber without a licence contrary to the Rubber Supervision Enactment No. 10 of 1937.

The accused claimed trial on the amended charge and was in due course convicted and fined $250. Section 38(ii) of Enactment No. 10 of 1937 reads as follows :—

"Any such prosecution may be conducted by the Supervisor, by any Deputy Supervisor or by any Officer appointed under this Enactment and specially authorised thereto in writing by the Supervisor or a Deputy Supervisor".

In my opinion it is quite clear that it was the intention that all prosecutions for offences under this Enactment should be under the control of the Supervisor of Rubber appointed under the Enactment. I am of opinion that all prosecutions must be conducted by the Supervisor or Deputy Supervisor, or by any officer appointed under the Enactment and specially authorised to prosecute in writing by the Supervisor or a Deputy Supervisor. There is nothing on the record to indicate that Police Inspector Abdul Kudus had any authority to prosecute in this case, and I therefore held the trial was a nullity and I allowed the appeal. The fine which has been paid must be repaid to the appellant.

An order was also made for the confiscation of the scrap rubber. I understand from Mr. Gould that the appellant does not ask for the rubber to be returned to him and I am not very surprised at this. However, the order of confiscation cannot stand and, subject to any further order that may be made in the event of the appellant being prosecuted again — which is possible as I hold the trial to have been a nullity — the rubber must eventually be disposed of in accordance with the usual procedure for disposal of exhibits in criminal cases.

Appeal allowed.

Solicitors for the appellant: *Lovelace & Hastings.*

HARDIAL SINGH & SONS LTD. v. PENINSULAR & ORIENTAL STEAM NAVIGATION CO. AND SINGAPORE HARBOUR BOARD.

[O. C. J. (Taylor J.) October 8, 1955]

[Singapore — Suit No. 2190 of 1953]

Bill of lading — Protection clause extending to agents of shipowners — Implied contract — Liability as warehousemen.

In this case the plaintiffs shipped 190 cases of piece goods on board a vessel of the 1st defendants to be carried from Japan to Singapore. By the terms of the bills of lading they were to take delivery alongside the steamer but in case they did not do so the shipowners had the option of delivering to the harbour authority at the port of destination, at the consignee's risk. The goods were delivered to the Harbour Board under this option, and the plaintiffs took delivery by instalments over a period of one month. Eventually they found that there was a shortage of one case, and made claims for non-delivery. The Court found as a fact that the 1st defendants had delivered the 190 cases to the Harbour Board and accordingly the case against them was dismissed with costs.

The Harbour Board submitted that they were relieved from liability by virtue of the contract of carriage contained in the bill of lading. The plaintiffs suggested that there was an implied contract between the consignees and the Harbour Board by which the latter undertook to store the goods safely. The Harbour Board denied any contractual relationship with the plaintiffs.

Held: (1) when the Singapore Harbour Board receive imported goods they do so as agents for the shipowners and their liabilities and immunities depend on the terms of the bill of lading; (2) in this case the shipowners, by the bill of lading, had contracted themselves out of liability for losses from the wharf; (3) in the circumstances of the case it was impossible to imply a contract between the Harbour Board and the plaintiffs.

Semble: if the goods are not collected within the normal period for delivery the Harbour Board may become liable as warehousemen.

Waters v. Dalgety (1) applied. **Firestone v. Singapore Harbour Board** (2) distinguished.

Cases referred to :—

(1) *Waters v. Dalgety* (1951) 2 Ll. L.R. 385.

(2) *Firestone v. Singapore Harbour Board* (1950) M.L.J. 47 and 131 (C.A.); (1952) M.L.J. 145 (P.C.).

(3) *Chartered Bank v. British India Steam Navigation* (1909) A.C. 369, 373.

CIVIL SUIT.

L. Rayner for the plaintiffs.

F. R. N. H. Massey for the 1st defendants.

C. H. Smith for the 2nd defendants.

Taylor J. : — This is a claim for a lost case of textiles.

The plaintiffs, who are drapers, purchased in Japan 190 cases of piece goods and shipped them to Singapore in a vessel owned by the first defendants. The goods were insured under an ordinary marine policy. They were tallied on board in Kobe and the shipowners issued clean bills of lading covering the whole consignment. By the terms of these bills of lading the consignees were to take delivery alongside the steamer but in case they did not do so the shipowners had the option of delivering to the harbour authority at the port of destination, at the consignee's risk. In practice it is usual, in Singapore for goods to be delivered to the Harbour Board, under this option, without special instructions. The shipowner's agents accordingly notified the Harbour Board of the expected time of arrival and the cargo to be landed and the ship came alongside a Harbour Board wharf on which there is a godown or warehouse. The shipowners and the Board each stationed a tally clerk near the entrance to the godown to tally the goods in. The shipowner's clerk did not know the number of cases shewn in the bills of lading; he tallied off the precise number, 190 cases. The Board's clerk tallied only 169 cases.

The Board endeavour to store the whole of the cargo delivered to them from any one ship in one godown and to clear it completely before the next ship arrives but this is not always practicable. The greater part of this cargo was collected by the various consignees within about 10 days of arrival and then, when there was space to move and sort the cases, the Board made their routine physical inspection of the residue and compared the cases found, by marks and numbers, with those shewn in the manifest, less those already delivered, so that any goods short delivered or overlanded could be traced and identified. When goods are delivered to consignees from the godown there is a double check — first when the cases are loaded on to the consignee's lorry and again when the vehicle passes the exit gate from the dock area to the public road. At each of these checks not only the leading marks but the serial numbers of the cases are visually inspected. Manifestly, a higher standard of accuracy in checking is practicable when the goods are split into individual lorry loads than when thousands of cases are discharged from a ship.

The plaintiffs took delivery by instalments over a period of one month and eventually found that they had 189 cases, leaving a shortage of one. On checking the goods in their warehouse with the invoices they identified the missing case as one which was, or should have been, marked "Karta 331, C. No. 5." They made claims for its non-delivery. The Board maintained that they had delivered all the cases received by them and referred the plaintiffs to the shipowners. The shipowners maintained that they had delivered the whole consignment to the Board. The consignees then claimed, and recovered, the insured value and the insurers now sue, in the name of the consignees, both the shipowners and the Board.

The first question is one of pure fact. By whom was the case lost? The shipowners called their tally clerk, an experienced man, who produced his tally sheets and declared that the full number of cases were delivered to the Board. His evidence was satisfactory.

The Board did not call their tally clerk but they produced his tally according to which only 169 cases were landed though 189 cases were delivered to the consignees. This difference is too large to be explained as an ordinary slip or error in tallying. There must have been a hiatus or mishap which involved the omission from the tally of a substantial portion of the consignment which was in fact delivered into the godown. There are many possible suggestions as to how this may have occurred but no one of them is more probable than any other. It is clear that the Board's tally is unreliable and there is no ground for imputing an error in the shipowner's tally. I found as a fact that 190 cases were duly delivered to the Board and as against the first defendants the suit was therefore dismissed with costs.

It is impossible to say exactly how or when the loss occurred. I do not infer that it was connected with the omission of the twenty cases from the Board's first tally. The loss may have occurred then or later. It is clear that in some way or other one case was lost between the time of transit from alongside the steamer to the warehouse and the time of delivery of the last instalment to the plaintiffs. The case was lost from the custody of the Board. The Board are therefore liable unless the risk was one which they did not take.

They submit a defence in point of law. They refer to the bill of lading and say that in the circumstances they were the agents of the shipowners to effect delivery from the wharf to the parties entitled to the goods, that by the terms of the contract of carriage contained in the bill of lading the shipowners were not liable for any loss after landing and that they, as agents of the shipowners are relieved of liability by virtue of that contract. This argument is supported by reference to *Waters v. Dalgety*[1].

The plaintiffs, suggested that there was an implied contract between the consignees and the Board by

which the Board undertook to store the goods safely. They referred to *Firestone v. Singapore Harbour Board*[2]. Mr. Rayner said that this case is not reported, except in the Privy Council, [(1952 M.L.J. 145], and produced a stencilled copy of the record but in fact the case is reported, both at first instance and on local appeal, in (1950) M.L.J. at pages 47 and 131. In the Privy Council the question of contract was expressly left open but it was submitted that the judgments below deal with the matter and are binding on this Court. It is therefore necessary to find exactly what was decided and for this purpose the stencil, which contains the pleadings and arguments, is more helpful than the printed reports. The case began, by the endorsement of the writ, page 3 as a simple claim for damages for breach of a contract of bailment and this plea must have referred to an alleged contract between the plaintiffs and the Board. The statement of claim pleads that the plaintiffs were the consignees, that the Board received the cargo on the implied terms that they would take care of it and deliver it to the plaintiffs on request and that the plaintiffs paid the storage charges in consideration of the Board undertaking such custody.

There is a difference between an implied contract and an express contract, of which some of the terms are implied. These pleas leave it doubtful which was meant; perhaps they were intended to cover either or both.

In their defence, page 9, the Board denied that they had ever had any contractual relationship with the plaintiffs. I cannot find that they ever receded from this position.

They also pleaded that whatever they did was done in pursuance of their statutory duties and that for various reasons they were not liable for any loss of the goods. Much of the trial was concerned with these issues. In his judgment the trial Judge said [(1950) M.L.J. p. 48]:—

"I do not think it was disputed . . . . . that if there was an implied contract, the plaintiffs, as owners of the goods, were the contracting party. Therefore, I propose to confine myself . . . . . to the . . . . . contention that the parties' relationship was statutory, not contractual".

He did not, however, so confine himself. Later at p. 48 he said:—". . . . the Board . . . . . in making their contract of bailment . . . ." and again, at page 50:—" the final question . . . whether . . . . the defendants are liable for breach of their contract of bailment." Some passages are obscure because the Judge wrote "shipper" when he meant "shipowner;" in such a context, "shipper" means the consignor, who may or may not be the same person as the consignee.

It seems that examination of the authorities led the Judge to shift gradually from the statutory to the contractual basis. Certainly he ended by deciding the case on the footing of a breach of contract but he never found in terms that there was such a contract nor did he state how, or between what parties, it was made or from what circumstances it was implied. There is a *lacuna* in the reasoning and the judgment is not an authority for the proposition that a contract between the Board and the consignee is to be implied. The headnote at page 47 of the printed report is not fully supported by the judgment.

In the Court of Appeal Murray-Aynsley C.J. at page 135, thought there probably was such a contract but regarded the question as immaterial. Gordon-Smith J. agreed generally without expressing any view as to the question of contract. Evans J. at page 139, said there was a contract between the Board and the shipping company. In short the *Firestone case* was litigated throughout on the issue of statutory protection, and as the statute has since been repealed the judgments are no longer in point.

The Australian[1] case is not technically binding on the Courts of Singapore but it is largely based on English cases which are binding. The facts were similar and the questions which now arise here were expressly reserved for argument before a full Bench. Their unanimous conclusions are entitled to the highest respect.

It is clear that in the present case there was a contract between the shipowner and the Board, under which the Board became agents, or subcontractors, to complete the contract of carriage by receiving the goods on discharge from the steamer and delivering them to the owner. During this phase the Board have the same liabilities and immunities as the shipowners who, by the bill of lading, had contracted themselves out of liability for losses from the wharf. The true issue therefore is whether, when this loss occurred, the contract of affreightment was still in course of performance, or whether it had come to an end and the Board had become warehousemen for the owner of the goods.

I say "owner," rather than "consignee," advisedly. In this particular case the consignee is the owner but it is not necessarily so. The goods may be sold while afloat, the consignee may endorse the bill of lading and the purchaser may surrender it to the shipowners in exchange for a delivery order. The present practice is not to endorse a delivery order on the bill of lading but to make out a separate instrument signed by the ship's agent, addressed to the Board, directing them to deliver the goods to the person named in the delivery order, on presentation. This emphasises the point that the Board hold the goods on behalf of the

shipowner, and deliver them to his order. They do ordinarily see the bill of lading (though they may have a copy for reference). They are not concerned with the consignee, as such. They are concerned with the person named in the delivery order who may be a forwarding agent for the consignee or a purchaser.

The plaintiffs made the point that the Board look to the party taking delivery for payment of their charges; this is true but it is referable to the contract of affreightment. It is stipulated in the bill of lading that if these charges arise, which may not occur, the consignor shall pay them. The consignor or his assigns become liable for the landing charges but the Board are still the agents of the shipowner. Alternatively the Board can rely on their statutory lien but in neither case are they in any contractual relation with the owner. It seems to me impossible to imply a contract between the Board and the owner in this phase, because, at the time when the Board receive the cargo, the person who ultimately becomes entitled to take delivery may not have bought the goods; he may not even have heard of them.

The plaintiffs also said that they maintain a running account with the Board, to which such charges are debited. This is true but it is a separate arrangement. A man who imports only occasionally must arrange to pay cash on delivery; regular importers settle their accounts at the end of the month. This is merely a difference in the mode of payment which cannot affect the liability of the Board, for loss of the goods.

I do not, however, wholly reject the idea of an implied contract between the Board and the owner of the goods. It sometimes happens that for one reason or another an importer does not promptly collect his goods. If he asks the Board to hold them, an express contract of storage would result but he may simply leave the packages there, perhaps for months, without presenting his delivery order or communicating with the Board in any way. Meanwhile the ship's agents will have collected the freight and regard the transaction as closed. The contract of carriage cannot be deemed to continue indefinitely, long after the actual voyage was completed. Sooner or later it would be necessary to imply a contract for storage between the Board, as warehousemen, and the owner of the goods, *Chartered Bank v. British India Steam Navigation Co.*[3] though it might be difficult to say exactly when the change occurred, especially where a consignment consists of several hundred parcels of which it is neither usual nor expected that delivery will be taken on a single occasion. It is necessary to examine the facts from this angle.

The port was to some degree congested at the material time. About ten days elapsed before there was sufficient space in the godown to sort out the undelivered cargo and ascertain shortages. The godown cannot have been cleared within a fortnight and if a few days are allowed for ordinary enquiries the phase of routine delivery must have lasted for at least three weeks. The plaintiffs cleared the last instalment after exactly a month. Their employees attended, to collect these and other goods, almost daily. The state of the various godowns and the course of business are within their actual knowledge. They alleged a contract and the onus is on them to prove the facts from which it might be implied. They have not attempted to show whether, when they collected their final intalment there was any or what other cargo, from the same ship, remaining undelivered or what the normal period for delivery was, at or near the material date. As ordinary delivery from this ship extended over at least three weeks it is impossible to say that one month is so long that a new contract must be implied. For this reason the claim against the Harbour Board was dismissed.

I would add a word as to the shipping marks. Counsel for the plaintiffs submitted that the expression "leading mark" includes the serial number of the case. The evidence negatived that view, and as a matter of construction it would make the word "leading" quite meaningless. The shipowner's tally clerks, on both lading and discharge, note the case numbers, for convenience, as and when they can, but their contractual responsibility is limited to recording the number of cases shipped by each consignor for each port of destination. I am satisfied that 190 cases marked "Karta — Singapore" were duly shipped and duly landed and that one of them was subsequently lost. It has not been shewn that the missing case was marked: — "331 C. No. 5." A mistake is no less likely to occur in the manufacturer's packing room than in any other place. This, however, has not affected the decision. If the defendants had been held liable the value of the missing case could have been ascertained and the particulars could have been amended, if necessary.

Claim dismissed.

Solicitors: *L. Rayner & Co.; Allen & Gledhill; Donaldson & Burkinshaw.*